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NO. 85-6461

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

EARLINE MARTIN

Petitioner

vs.

STATE OF OHIO

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent submits that the questions presented by the record in this case are more properly stated as follows:

I. Whether a criminal conviction should be overturned on the basis of the prosecutor's comments taken out of context and not objected to by defense counsel.

II. Whether petitioner was prejudiced by the trial court's instructions that do not require or suggest unanimity among the jurors on the greater offense, before they may evaluate the lesser offense.

III. Whether Ohio Revised Code §2901.05 which requires the prosecution to prove beyond a reasonable doubt, every element of a homicide offense as defined by statute, and does not require the defendant to disprove an essential element of this offense and which requires defendants to prove, by a preponderance of the evidence, the affirmative defense of self-defense violates due process of law.

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TO: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

OBJECTIONS TO JURISDICTION

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed the conviction. The Supreme Court of Ohio, likewise affirmed the conviction.

The Ohio Courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal questions is therefore presented by the petition for writ of certiorari.

STATEMENT OF THE CASE

Petitioner, Earline Martin, was indicted, tried and convicted of the crime of aggravated murder, Ohio Revised Code §2903.02, with firearm specification. Petitioner's appeals to the Court of Appeals, Eighth Judicial District, and the Ohio Supreme Court, resulted in her conviction being affirmed.

STATEMENT OF THE FACTS

The State's evidence consisted of fifteen witnesses which proved beyond a reasonable doubt that the petitioner, Earline Martin, was guilty of aggravated murder. The victim was Walter Martin, a seventy-three year old retired police officer and the petitioner's sixth and last husband. It was Mr. Martin's second marriage. During the duration of their marriage, in May of 1983, Mr. Martin was hospitalized for a heart attack and stroke (R. 437).

The testimony of several State witnesses established that this short-lived marriage was not harmonious. Delores Williams, Walter Martin's eldest daughter, testified that on July 18, 1983, she called petitioner to inform her Mr. Martin had temporarily moved into her Warresville Heights apartment (R. 232). Earline Martin's reaction to the separation was as follows: "Your father is not going to leave me again. I took my marriage vows seriously. I said, 'To death do us part' and that's what I meant" (R. 232).

Narleen Brown, the granddaughter of Walter Martin, testified to a conversation with Earline Martin on the same day. Regarding Mr. Martin leaving her, petitioner specifically stated: "I'm going to tell you one thing, Nickie, bad luck will follow your daddy (grandfather) for the rest of his life," and hung up the phone (R. 289).

Gloria Oliver, the second daughter of Walter Martin, testified to a conversation with petitioner after the couple's first separation. Petitioner confided in her, admitting that "Before I let your father make a fool of me again, I'll blow him away, Gloria Jean" (R. 315). Gloria Oliver also called the petitioner's home on the morning of July 21, 1983, shortly after the victim's murder. In answer to her question as to what was wrong, the petitioner told: "Gloria Jean, I'm tired of fighting with your father" (R. 318).

The State further offered the testimony of Mr. Anthony LaPerna, Walter Martin's attorney. Mr. LaPerna substantiated that Walter Martin had twice

sought to petition for divorce during his brief marriage to petitioner. This dated back to December, 1982, and again on July 19, 1983 (R. 342, 344).

The State submits that it was as a direct result of this unhappy marriage and the fact that the victim wanted a divorce, further established by the threats of petitioner, that ultimately lead to the murder of decendent by petitioner.

The events of July 21, 1983:

According to the written statement of petitioner, in the early morning hours of July 21, 1983, she went upstairs, got a gun, and went into the kitchen where Walter Martin was sitting. Walter Martin was coming towards her, and she shot him, causing his death (R. 361-362). The petitioner claimed she shot him in self-defense. The jury, after being presented with the physical evidence of this case, rejected this claim of self-defense and found petitioner guilty of aggravated murder.

Sadie Martin, the roommate of Delores Williams, testified that prior to the killing, at approximately 9:00 in the morning, Walter Martin called his daughter. She spoke to Mr. Martin several minutes before informing Delores her father was on the line. Sadie Martin came back to the phone to tell him Delores would return his call. She heard petitioner over the phone yell, "Dirty--" and five or six subsequent gunshots in rapid succession. The phone dropped at the other end of the line (R. 1720.

The Emergency Medical Services were the first to arrive at the murder scene (R. 87). The petitioner testified that she first called her attorney, Thomas Watson, who advised her to call the police (R. 445). Mr. Roman Black of the Cleveland Emergency Medical Service testified to receiving the broadcast at 9:44 a.m., and arriving at the scene ten minutes later (R. 86). A woman let him in, whereupon he found a prone male lying on the kitchen floor (R. 87-88). The woman, dressed in a robe with curlers in her hair, appeared calm (R. 96). As to the condition of the body, there was a large amount of coagulated blood nearby (R. 90), and the victim was dead (R. 89, 109).

The police arrived at the scene at approximately 9:50 a.m. (R. 112). Terry Hageman, a patrolman for the city of Cleveland, testified that he and his partner were told by petitioner that she had shot her husband (R. 114). She told there where to find the gun used to kill the victim (R. 122, 123).

Upon checking the gun, it appeared to have spent bullets (R. 124). They observed the body lying on the floor, next to a phone jack on the floor board (R. 114-116). There was a telephone on the wall above the jack (R. 117).

Detective Pollutro of the Cleveland Police Department Scientific Investigation Unit, testified to receiving the firearm from Detective Taliaferro, assigned to the case (R. 145). The weapon was tested for trigger pull (R. 147). Detective Pollutro was asked to determine whether the morgue pellets, removed from the dead man, were fired from this particular gun. The comparison test established that this gun could have fired the bullets causing the victim's death (R. 150-151).

The State presented two witnesses from the Cuyahoga County Coroner's Office. Dr. Robert Challener, an expert in forensic, anatomical and clinical pathology, gave the following testimony (R. 37). His observations showed the victim received three gunshot wounds. He concluded the gunshot wound entering the trunk area would have been fatal even if it was the only shot fired (R. 47-48). He also opinioned that the wound to the chest had been fired from a distance of two feet or beyond (R. 39-42). No drugs or alcohol were found in the victim's body (R. 51-52).

Sharon Rosenberg, a trace evidence technician for the Cuyahoga County Coroner's Office, testified to the results of Trace Metal Detection and gunshot residue tests performed on the decedent's body and clothing (R. 67-70). She testified there was no evidence of metal on the victim's hands to indicate that he recently had contact with a metal object such as a gun (R. 72). The probable distance from which the murder weapon was fired was beyond two to three feet (R. 74-75). Her testimony corroborated that of Dr. Challener's testimony.

The petitioner was the sole witness for the defense. According to her testimony, in the early hours of July 21, 1983, she and the victim fought over grocery money (R. 441). She claims that the victim hit her (R. 441). Later, she went upstairs, washed and rolled her hair, and put on a duster (R. 441-442). Petitioner then went into the bedroom and got a gun (R. 442). She intended to hide it in the kitchen where the victim was sitting (R. 442-443). Before she could do so, the victim questioned her as to what she had in her hands (R. 443). She then shot him (R. 443), six times.

Defense counsel sought to establish a defense of self-defense. Defense counsel elicited from petitioner, a prior incident concerning an alleged pistol-whipping petitioner allegedly received from the victim some three months before the killing (R. 432).

The defense counsel requested jury instructions on self-defense and the trial court complied (R. 699-704).

REASONS FOR DENYING THE WRIT

I. A criminal conviction should not be reversed on the basis of the prosecutor's comments, taken out of context, and not objected to by defense counsel and were not prejudicial.

Petitioner contends that the prosecutor's remarks in closing argument characterizing petitioner's testimony as fabrication, were substantial prejudicial error requiring reversal.

We begin our discussion by observing that defense counsel, like the prosecutor, must refrain from interjecting personal beliefs into the presentation of their case and must not be permitted to make unfounded and inflammatory attacks on opposing advocates. See, Berger v. U.S., 295 U.S. 78 (1935). The Berger court, made is crystal clear that the adversary system permits the prosecutor to prosecute with "earnestness and vigor." Ibid.

In the present case, the prosecutor's remarks in closing argument, emphasizing that the testimony adduced at trial implies that the petitioner was lying, was a characterization of the evidence that did not induce the jury to base their decision on considerations not suggested by the evidence. It is well established that comments on the credibility of a witness in closing argument are permissible. See, State v. Price, 60 Ohio St. 2d 136 (1979). It should also be pointed out that the record reflects that defense counsel did not properly object to the above mentioned prosecutorial remarks. Where no timely objection is made by counsel, the objections are deemed waived. See, State v. Williams, 51 Ohio St. 2d 112 (1977); also, Wainwright v. Sykes, 433 U.S. 72 (1977).

Finally, this Court in U.S. v. Young, 105 S. Ct. 1038, ___U.S.___ (1985) observed that a prosecutor's comments, standing alone, would never justify a reversal of a criminal conviction. This Court held that a reviewing court

must also take into account, defense counsel's opening salvo.

II. The petitioner was not prejudiced by the trial court's instructions that do not require or suggest unanimity among the jurors on the greater offense, before they may evaluate the lesser offense.

Petitioner next contends that she was denied due process of law when the trial judge instructed the jury not to consider the lesser-included offenses until it made a determination regarding the offense of aggravated murder. Although petitioner argues that these instructions had the effect of preventing the jury from considering the lesser-included offenses, we are not persuaded that this was the case.

This argument was previously rejected in State v. Muscatello, (1977) 57 Ohio App. 2d 231 [11 O.O. 3d 320], affirmed (1978), 55 Ohio St. 2d 201 [9 O.O. 3d 148], where the Ohio Supreme Court stated that a similar charge on voluntary manslaughter and its lesser-included offenses was not prejudicially erroneous. When the jury has before it all the evidence and instructions for each offense, it is realistic to assume that the jury will not consider each offense in isolation from the others. If, as in the case sub judice, the jury unanimously determines that defendant is guilty of the highest degree of the offense, it can be assumed that the jury has also considered and rejected evidence regarding self-defense and the lesser-included offenses.

III. The Ohio law requiring defendants to prove, by a preponderance of the evidence, the affirmative defense of self-defense, does not violate due process of law where the prosecution must prove, beyond a reasonable doubt, every element of a homicide offense, and does not require the defendant to disprove any essential element of this offense.

Our first consideration concerning petitioner's contention that the state of Ohio may not constitutionally place the burden of proving self-defense on a defendant if the truth of that defense would negate an essential element of the crime charged. Petitioner asserts that self-defense negates the mens rea of aggravated murder and that requiring a defendant to prove self-defense thus compels the defendant to prove his innocence by disproving criminal intent. Since it is constitutionally impermissible to require an accused to prove his innocence, petitioner contends that once a defendant produces evidence of self-defense, the prosecution must then disprove self-defense

beyond a reasonble doubt.

There is no merit in this contention. Ohio Revised Code §2901.05(A) clearly states that the burden of proving all elements of the offense charged including mens rea, beyond a reasonable doubt, is on the prosecution. This section also places the burden of proving an affirmative defense, by a preponderance of the evidence, on the accused. Ohio Revised Code §2901.05(C)(2) defines an affirmative defense as "[a] defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence." This court has long determined that self-defense is an affirmative defense. See State v. Nolton, (1969) 19 Ohio St. 2d 133 [48 O.O. 2d 119].

In the case sub judice, petitioner was charged with the offense of aggravated murder. Thus, the state was required to prove beyond a reasonable doubt the elements of that crime, defined by Ohio Revised Code §2903.01 as purposely, and with prior calculation and design, causing the death of another. Certainly no less can be required of the state because "* * * the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, (1970) 397 U.S. 358, 364 [51 O.O. 2d 323]. Petitioner contends however, that the Constitution requires more. Not only must the state prove the elements of the crime charged, appellant asserts, it must also disprove self-defense. We are unable to find support for this contention.

In Patterson v. New York, (1977) 432 U.S. 197, the United State Supreme Court addressed a question very similar to that in the case sub judice. At issue was the constitutionality of a New York statute which placed upon the defendant the burden of proving the affirmative defense of extreme emotional distress. The Patterson court held that, consistent with due process, the prosecution was required to prove beyond a reasonable doubt only those elements included in the statutory definition of the offense charged. The recognition of an affirmative defense, the court stated, did not require the state to prove its nonexistence:

"We thus decline to adopt as a constitutional imperative, * * * that a State must disprove beyond a reasonable doubt every fact constituting any

and all affirmative defenses related to the culpability of an accused." Patterson, supra, at 210.

The Supreme Court also recognized in Patterson that the obligation to disprove the existence of self-defense is a burden which the state, in its judgment, may properly deem too onerous to undertake in view of the fact that an affirmative defense is one involving facts peculiarly within the knowledge of the defendant, which he, not the state, may fairly be required to prove. This is exactly the view contained in Ohio Revised Code §2901.05(C)(2).

The Patterson court also noted that there are affirmative defenses which do not seek to negate any of the elements of the offense which the state is required to prove. Id. at 206-207. This is the nature of self-defense under Ohio law. This court, in State v. Poole, (1973), 33 Ohio St. 2d 18, 19 [62 O.O. 2d 340], characterized the defense of self-defense as a "justification for admitted conduct." Self-defense represents more than a "denial or contradiction of evidence which the prosecution has offered as proof of an essential element of the crime charged * * *." Id. Rather, we stated in Poole, this defense admits the facts claimed by the prosecution and then relies on independent facts or circumstances which the defendant claims exempt him from liability. Id. Thus, the burden of proving self-defense by a preponderance of the evidence does not require the defendant to prove his innocence by disproving an element of the offense with which he is charged. The elements of the crime and the existence of self-defense are separate issues. Self-defense seeks to relieve that defendant from culpability rather than to negate an element of the offense charged. In the case sub judice, the State proved beyond a reasonable doubt that petitioner purposely and with prior calculation and design, caused the death of her husband. Petitioner did not dispute the existence of these elements, but rather sought to justify her actions on grounds she acted in self-defense.

We therefore hold that Ohio Revised Code §2901.05 requires the prosecution to prove beyond a reasonable doubt every element of a homicide offense as defined by statute, and does not require the defendant to disprove any essential element of this offense. Thus, the state may constitutionally require a defendant to prove, by a preponderance of the evidence, the affirmative defense of self-defense. Accord, State v. Moran, (Cuy. Cty. Ct. App.,

October 27, 1983), unreported case number 45879, certiorari denied Moran v. Ohio, (1984), ____ U.S. ____, 83 L. Ed. 2d 285.

CONCLUSION

In conclusion, the respondent submits that the petition herein fails to present any question of constitutional dimension justifying review by the Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN T. CORRIGAN, Prosecuting Attorney
of Cuyahoga County, Ohio

BY: _____
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SERVICE

A copy of the foregoing Brief in Opposition to Petition for a Writ of certiorari has been mailed this 31st day of March, 1986, to: James R. Willis, Attorney for Petitioner, Suite 610, Bond Court Building, 1300 East Ninth Street, Cleveland, Ohio 44114.

_____
Assistant Prosecuting Attorney

NO. 85-6461

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

EARLINE MARTIN

Petitioner

vs.

STATE OF OHIO

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

AFFIDAVIT OF FILING

I, JOHN T. CORRIGAN, being first duly cautioned and sworn, depose and say that I am a member of the bar of this Court and otherwise competent to execute this affidavit, pursuant to Rule 28.2, Rules of the United States Supreme Court. On the thirty-first day of March, 1986, I caused to be sent by first class, prepaid United States mail, to the Clerk of Court, United States Supreme Court, 1 First Street, Washington, D.C. 20543, one copy of the Brief in Opposition to Petition for a Writ of Certiorari to the United States Supreme Court in the above captioned manner. Such mailing was made within the time permitted by this Court for such a filing.

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SWORN to before me and subscribed in my presence this 31st day of March, 1986.

SHEILA K. BURT, Notary Public
For The State of Ohio - Cuyahoga County
My Commission Expires Jan. 15, 1990

NOTARY PUBLIC

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

OHIO REVISED CODE § 2903.01

§ 2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another who is a member of a group engaging in a pattern of [illegible] to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder and shall be punished as provided in section 2929.02 of the Revised Code.

(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. In no case shall [illegible] aggravated murder case be instructed on a manner that it may believe that a person may commit or attempt to commit any offense unless it finds that the person is to be convicted, knowingly engaged in a common [illegible] with others to commit the offense in question or because the offense and the manner or circumstances would be likely to produce death. Culpable intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. It is not [illegible] an aggravated murder case to be instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be convicted, because he or she engaged in a common design with others to commit the offense in question or because the offense and the manner or circumstances would be likely to produce death, unless intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense, the jury shall be instructed that the inference is not conclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 45879

STATE OF OHIO

Plaintiff-Appellee

vs.

BETTY MORAN

Defendant-Appellant

JOURNAL ENTRY
and
OPINION

DATE OF ANNOUNCEMENT OF DECISION: OCT 27 1983

CHARACTER OF PROCEEDING: Criminal appeal from Common Pleas Court Case No. Cr. 164,766

JUDGMENT: Affirmed.

DATE OF JOURNALIZATION:

APPEARANCES:

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McMANAMON, ANN, J.:

Betty Moran, the defendant below, appeals her conviction on a charge of the aggravated murder (R.C. 2903.01), of her husband, Willie Moran.

It is undisputed that, on the afternoon of May 15, 1981, Betty Moran shot Willie Moran six or seven times after a lengthy and intermittent argument over some money the decedent believed his wife was witholding from him. (Tr. 225, 226, 227) Three days later the appellant learned that police were looking for her in connection with the slaying and she called them, directed them to the victim's body and confessed to the killing.

An indictment, trial in Common Pleas Court and conviction followed, from which Betty Moran appeals, enumerating three assignments of error:

I.

"THE COURT ERRED IN DENYING THE DEFENDANT'S VARIOUS MOTIONS FOR JUDGMENT OF ACQUITTAL AND HIS [sic] MOTION FOR A NEW TRIAL."

II.

"THE COURT ERRED IN CHARGING THE JURY, THAT TO PREVAIL ON A PLEA OF SELF-DEFENSE THE DEFENDANT WAS REQUIRED TO, IN EFFECT, PROVE HIMSLEF [sic] NOT GUILTY."

III.

"A DEFENDANT IS DENIED DUE PROCESS AS A CONSEQUENCE OF A JURY INSTRUCTION THAT AS A PREREQUISITE TO EVEN RAISING THE DEFENSE OF SELF-DEFENSE, SHE HAD TO ESTABLISH THAT THE DECEDENT WAS THE AGGRESSOR WHICH INSTRUCTION EFFECTIVELY DILUTED THE PROSECUTION'S BURDEN OF PROVING ALL THE ELEMENTS OF THE OFFENSES CHARGED."

I

In appellant's first assignment of error she argues that the trial court erred when it overruled her motions for acquittal and new trial because there was insufficient evidence produced by the state to demonstrate that appellant acted with prior calculation and design or that the killing of Willie Moran was unlawful.

This assignment of error is not well taken.

The standard to be applied by the trial court in ruling on a defendant's motion for acquittal can be found in State v. Bridgeman (1978), 55 Ohio St. 2d 261. The syllabus to that opinion states:

> "Pursuant to Crim. R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

After careful review of the record it is apparent to this court that appellant's motions were properly overruled as there was sufficient evidence presented on each element of the offense of aggravated murder to require submission of the matter to the jury and, later, to support the appellant's conviction.

The elements of aggravated murder are found in R.C. 2903.01(A) which provides:

> "(A) No person shall purposely, and with prior calculation and design, cause the death of another."

The Ohio Supreme Court has previously construed "prior calculation and design" in State v. Robbins (1979), 56 Ohio St. 2d 74 and State v. Cotton (1978), 56 Ohio St 2d 8, by stating:

> "Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified." Robbins, supra at 79, citing Cotton.

This court in State v. Jenkins (1976), 48 Ohio App. 2d 99, at 102 noted:

> "The trier of fact must look to the context in which the killing occurred to determine whether there was prior calculation and design. Some of the important factors to be examined and considered in deciding whether a homicide was committed with prior calculation and design include: whether the accused knew the victim prior to the crime, as opposed to a random meeting, and if the victim was known to him whether the relationship had been strained; whether thought and preparation were given by the accused to the weapon he used to kill and/or the site on which the homicide was to be committed as compared to no such thought or preparation, and whether the act was drawn out over a period of time as against an almost instantaneous eruption of events. These factors must be considered and weighed together and viewed under the totality of all circumstances of the homicide."

Betty Moran's statement to police three days after the shooting, which was read to the jury, was amplified on direct and cross-examination at trial. Appellant's pre-trial admissions and trial testimony demonstrated that she and the victim had an argument; that the victim allegedly threatened to kill her when he awakened if she did not have certain money he wanted; that she left his presence and attempted unsuccessfully to procure the money demanded; that she returned while the victim was sleeping, picked up the pistol she knew was available at his bedside that she fired a shot; that she ignored his demand for an ambulance and then emptied the six shot revolver into the

victim's body; that she re-loaded it and fired two or three more times at him.

A trier of fact could reasonably infer from the evidence presented that the lapse of time between the Morans' final argument and the fatal shots fired by Betty Moran provided sufficient opportunity for appellant to plan the killing and for that planning to constitute prior calculation and design. In addition, the fact that appellant fired at least seven shots at the decedent could cause a jury to conclude reasonably that appellant acted with something more than "instantaneous deliberation" when she shot her husband. See Cotton, supra.

It would appear that the jury chose, on the basis of the evidence presented, to reject appellant's argument of self-defense and to find her guilty of aggravated murder.

It is well settled that the weight to be given to the evidence and the credibility of the witnesses is primarily for the trier of fact and a reviewing court will not reverse a judgment of conviction, where the record shows that a verdict of guilty was returned by a jury on sufficient evidence. State v. DeHass (1967), 10 Ohio St. 2d 230.

In this assignment of error appellant also argues that prior calculation and design cannot be established when there is evidence showing that, in the midst of an ongoing episode of serious confrontation, one party resorts to the use of deadly force in self-defense. It is her contention that the use of force in these circumstances cannot be considered to be unlawful, and therefore the charge of aggravated murder and murder should not have been submitted to the jury. We disagree and cite this court's opinion in Jenkins, supra, which stands for the proposition that the mere interposition by defendant of the affirmative defense of self-defense does not preclude

a jury from rejecting this defense and reasonably concluding that there was (or was not) prior calculation and design on defendant's part.

II and III

Appellant's second and third assignments of error relate to the trial court's charge to the jury on self-defense. We will consolidate them for consideration.

It is appellant's contention, the provisions of R.C. 2901.05 notwithstanding, that the court's instructions to the jury which placed the burden of proving the defense of self-defense upon the appellant, violated her due process rights by requiring appellant to prove herself innocent of the charges against her. In support of this proposition appellant relies on Patterson v. New York (1977), 432 U.S. 197 and Mullaney v. Wilbur (1975), 421 U.S. 684. But, as noted in Krzeminski v. E.P. Perini (C.A.6, 1980), 614 F. 2d 121 (involving an Ohio prisoner's petition for habeas corpus relief alleging errors in the state trial judge's jury instructions):

> "Patterson makes it clear that so long as a jury is instructed that the state has the burden of proving every element of the crime beyond a reasonable doubt, there is no due process violation. The state may properly place the burden of proving affirmative defenses such as self-defense, extreme emotional disturbance or insanity upon the defendant. Patterson, supra; ... What the state may not do is presume that an element of a crime exists as a result of given conduct and then place the burden of showing otherwise on the defendant. Mullaney v. Wilbur, supra." Id. at 123-124.

Revised Code 2901.05, in pertinent part provides as follows:

> "(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is

> upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.
>
> * * *
>
> "(C) As used in this section, an 'affirmative defense' is either of the following: "(1) A defense expressly designated as affirmative; (2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence."

The Supreme Court of Ohio has determined that self-defense is an affirmative defense. See State v. Poole (1973), 33 Ohio St. 2d 18. It has also held that:

> "To establish self-defense, the following elements must be shown: (1) the slayer was not at fault in creating the situation giving rise to the affray; (2) the slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) the slayer must not have violated any duty to retreat or avoid the danger. State v. Robbins (1979), 58 Ohio St. 2d 74."

In order for appellant to establish the affirmative defense of self-defense it was imperative that she produce evidence to show that she was not the aggressor (See Robbins, supra). The evidence introduced by the state clearly indicated that appellant left her husband's presence, after words were exchanged, and that, after a lapse of time, she returned to the room where her husband was lying abed and shot him in the back and chest. To maintain a defense of self-defense the court's instruction fairly required the appellant to show that she was not the aggressor, thus providing a justification for her admitted actions which was, if existent, peculiarly within her own knowledge as envisioned by R.C. 2901.05 (C)(2), and which, it was

her claim, motivated the killing.

The issues raised by appellant in her last two assignments of error have been considered by this court several times in the past. We have held, and continue to do so here, that the trial court's instruction which placed the burden of proving the affirmative defense of self-defense upon the appellant did not violate her right to due process. See State v. Jones (March 31, 1983), Cuyahoga App. No. 44983, unreported; State v. Henderson (Dec. 17, 1981), Cuyahoga App. No. 43489, unreported; State v. Walker (May 30, 1980), Cuyahoga App. No. 40586, unreported.

After reviewing the instructions given in the case at bar, we are satisfied that a proper rendition of Ohio law was given on the charge of self-defense and on the charge that the state was required to prove beyond a reasonable doubt each and every essential element of the crime charged.

Assignments of error II and III are not well taken.

Judgment of the Court of Common Pleas is affirmed.

It is ordered that appellee(s) recover of appellant(s) its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the COMMON PLEAS Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

PATTON, C. J.,

DAY, J., CONCUR.

RECEIVED FOR FILING

[illegible] 1983

GERALD E. FUERST, CLERK

BY [illegible] DEP.

JUDGE

ANN McMANAMON

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.